CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1034

NICOLÁS NOGUERAS, JR., FRANK RODRÍGUEZ GARCÍA, MERCEDES TORRES DE PÉREZ, EDWIN RAMOS YORDÁN, JOSÉ M. RAMOS BARROSO, CALIXTO CALERO JUARBE, HIPÓLITO MARCANO, JOSÉ MARIANO RÍOS RUIZ, and JUAN RIVERA ORTIZ,

Petitioners

v.

PUERTO RICO INTERNATIONAL AIRLINES, INC., JAMES A. CERESA, RAFAEL COLÓN and JORGE DEL VALLE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Cases:

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v.

PUERTO RICO INTERNATIONAL AIRLINES, INC., JAMES A. CERESA, RAFAEL COLÓN and JORGE DEL VALLE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioners, in their official capacity as members of the Labor Legislative Commission of the Legislature of the Commonwealth of Puerto Rico, hereinafter "the Commission", respectfully pray this Honorable Court to issue a Writ of Certiorari to review the Order of the United States Court of Appeals for the First Circuit, rendered on November 11, 1977, in cause number Civil 77-8100, *Puerto Rico International Airlines, Inc., et al* v. *Nicolás Nogueras, Jr., et al.*

OPINIONS BELOW

The Order of the United States Court of Appeals for the First Circuit, as yet unreported, appears at Appendix pp A-1 through A-2. The Order of the United States District Court for the District of Puerto Rico, is unreported and appears at Appendix pp. A-3 through A-6.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254 (1) and Rule 19 (1) (b) of the Rules of this Honorable Court, to review an Opinion of the First Circuit which has rendered a decision on important questions of federal law which have not been, but should be, settled by this Honorable Court. Said questions are of imperative public importance to justify a writ of Certiorari.

The decision of the First Circuit was entered on November 11, 1977. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the complaint presents a case or actual controversy cognizable by the Judicial Power of the United States.
2. Whether the Eleventh Amendment to the Constitution of the United States bars a suit seeking to enjoin legislative officials, acting as the Labor Commission of the Senate of the Commonwealth of Puerto Rico, from exercising their inherent investigative power in a proper legislative fact finding inquiry.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. III, Sec. 2 of the Constitutions of the United States in so far as pertinent herein, provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[1]

Section 2 of the Railway Labor Act, 45 U.S.C. § 151a provides:

> "The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or

[1] Suits against the state by its own citizens are also barred by the Eleventh Amendment. *Edelman* v. *Jordan*, 415 US 651, 662-663 (1974).

working conditions. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186."

The Civil Rights Act, 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Article III, § 14 Constitution of the Commonwealth of Puerto Rico provides:

> "The members of the Legislative Assembly shall not be questioned in any other place for any speech, debate or vote in either house or in any committee."

STATEMENT OF THE CASE

This Petition arises from an Order of the First Circuit, dated November 11, 1977, vacating an Order of the District Court for the District of Puerto Rico, dated October 31, 1977 in the case of *Puerto Rico International Airlines, Inc., et al* v. *Nicolás Nogueras, Jr., et al.*, Civil No. 77 1613, whereby the District Court dismissed the complaint for lack of jurisdiction in view of the provisions of the Eleventh Amendment to the United States Constitution.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

The original lawsuit was commenced on October 25, 1977 when plaintiffs, Puerto Rico International Airlines, Inc., et al., hereinafter "Prinair", filed a complaint (Appendix pp. A-7/14) in the District Court alleging in essence that the "Commission", acting under color of state law, subpoenaed three coplaintiffs, officers of Prinair, requiring them to appear at a public hearing to be held by the Commission in relation to several labor matters, including but not limited to the state of the collective bargaining of Prinair with one of the unions representing its employees.

The complaint sought to enjoin the investigation, and on the same filing date of the complaint, the District Court denied Prinair's application for a temporary restraining order.

On October 27, 1977 Prinair applied to the United States Court of Appeals for the First Circuit for an injunction against the Commission, pending appeal.

On October 31, 1977 the Court of Appeals granted Prinair's request and entered an Order enjoining the Commission from questioning Prinair about its collective bargaining negotiations until further notice. (Appendix pp. 15) On that same date the District Court dismissed Prinair's complaint for lack of jurisdiction. (Appendix pp. A-3/6)

On November 11, 1977 the Court of Appeals vacated the dismissal order of the District Court and remanded the action for further proceedings and ordered that its October 31, 1977 injunction should remain in effect until vacated or modified by the District Court. (Appendix pp. A-1/2)

On December 13, 1977 the Commission filed its answer to the complaint, (Appendix pp. A-17/25) challenging the jurisdiction of the District Court.

REASONS FOR ALLOWANCE OF THE WRIT

I

The Complaint Fails to Present a Case or Actual Controversy Cognizable by the Judicial Power of the United States .

To enable the Federal Judicial Power to entertain a complaint, Art. III, Sec. 2 of the Constitution requires that a genuine and present controversy, not merely a possible or conjectural one, must exist between the parties and that such controversy must be disclosed upon the face of the complaint.

In the case at bar, plaintiffs allege a possible or conjectural controversy that will arise if and when questions are posed to them requiring disclosure of matters involved in their collective bargaining. On this possibility, plaintiff complain and pray for injunctive relief to protect rights allegedly arising under the Federal Railway Labor Act.

This conjectural pleading fails to state a case or actual controversy between plaintiffs and the Commission. The facts alleged do not meet the Art. III requirements needed to invoke the Federal Judicial Power. The complaint fails to show any question asked by the Commission and left unanswered or any objection raised by plaintiffs or any ruling entered by the Commission conceivably invading plaintiffs federally protected rights. Plaintiffs conjectures of the possibility of such questions being asked and the possible overruling of their objections thereto by the Commission, are not the genuine and present controversy required for a federally cognizable case.

At the time the complaint was filed, the only matter pending before the Commission was the subpoening of plaintiffs to appear before the Commission and testify. This is obviously within the legitimate powers of the Legislature. As stated by this Honorable Court:

> "The national . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible". Garner v. Teamsters Union, 346 US 485, 488, 98 L Ed 228, 74 S Ct. 161 (1953). Federal labor policy as reflected in the National Labor Relations Act, as amended, has been construed not to preclude the States from regulating aspects of labor relations that involve 'conduct touch[ing] interests so deeply rooted in local feeling and responsibility that . . . we could not infer that Congress had deprived the States of the power to act'. San Diego Unions v. Garmon, 359 US 236, 244, 3 L Ed 2d 775, 79 S Ct. 773 (1959). Policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States.
>
> Similarly, the federal law governing labor relations does not withdraw 'from the States . . . power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act'. Id., at 243, 3 L Ed 2d 775, 79 S Ct 773." *Machinists* v. *Wisconsin Emp. Rel. Comm'n.*, 427 U.S. 132, 136 (1976)

As to plaintiff's resistance to the Commission's subpoenas and the subsequent efforts of the latter to enforce said subpoenas and compel attendance by legal proceedings, we respectfully submit that these are matters of state law that, under the facts of this case, are not open to interference by the Federal Judicial

Power. *Younger* v. *Harris,* 401 US 37 (1971); *Huffman* v. *Pursue,* 420 US 592 (1975).

In the absence of a case or actual controversy between the Commission and Prinair, the District Court was without jurisdiction to grant the remedy requested and its Order dismissing the complaint for lack of jurisdictions was correct and should be sustained, and the order of the Court of Appeals should be reversed.

II

The Eleventh Amendment Bars a Suit Seeking to Enjoin State Officials Acting as a Labor Commission of the Senate of the Commonwealth of Puerto Rico from Exercising Their Inherent Investigative Power in a Proper Legislative Inquiry.

The issue of the Eleventh Amendment as a bar to an action seeking injunctive relief from an action of state officials allegedly violating federally protected rights represents one of the most dramatic judicial efforts to give meaning to the Constitution.

In the case at bar, the Circuit Court, citing *Employees* v. *Department of Public Health and Welfare,* 411 U.S. 279 (1973) and *ExParte Young,* 209 U.S. 123 (1908), reversed the decision of the District Court and held that the Eleventh Amendment does not bar an action requesting injunctive relief from action of state officials allegedly violating federally protected rights.

Although this broad statement may be generally correct, it has no bearing in the instant case. In the first place, both cases cited are inapposite to the case at bar.

In *Employees* v. *Department of Public Health,* etc., *supra,* the Supreme Court expressly held at page 284 that:

> "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a non-consenting state."

In its concurrent opinion (Marshall, J.), at page 292, the Court expressed also that on Article III of the Federal Constitution, the federal judicial power does not extend to suits of citizens against the states and that the Eleventh Amendment, as an answer to the case of *Chisolm* v. *Georgia,* 2 Dale 419 (1973) is but a clarification of the intention of the Constitutional Convention with respect to the reach of the federal judicial power.

On the other hand, *ExParte Young,* supra, merely holds that a state official seeking to enforce in the name of a state an inconstitutional act

> ". . . comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct. The State has no power to impart to him any immunity from responsibility to the Supreme authority of the United States." (pages 195-160)

In the present case, the complaint does not pretend to enjoin the action of an official who tries to enforce an unconstitutional law. Nor is there present any conflicting state statute impinging on a field preempted by federal law as was the case in *General Electric* v. *Callahan,* 294 F 2d. 60 (1961).

The complaint attempts to enjoin the Legislature of Puerto Rico from acting in the exercise of the fact finding powers conferred to it by the Constitution of

the Commonwealth of Puerto Rico. The "Commission" herein, a legislative body, is an arm or *alter ego* of the Commonwealth of Puerto Rico, and therefore not a person under 42 U.S.C. § 1983. *Monroe* v. *Pape,* 365 US 167 (1961). At all times pertinent to this case, it was performing the essence of its governmental functions, namely, the law making process at its initial level, namely, the fact finding investigation essential to adequate legislation in the non preempted areas.

In *U.S.* v. *Craig,* 528 F 2d. 773 (1976) the Court of Appeals for the Seventh Circuit found that state legislators enjoy the federal common law speech and debate privilege.

In the words of the Court, 528 F 2d at page 779:

> ". . . Thus in view of the purposes of the speech or debate privilege, its common law history, and the important role of the states in governing the country, *we hold that state legislators are entitled to a federal common law speech or debate privilege applicable in federal criminal prosecutions.*" (Emphasis supplied)

Subsequently, the court en banc, reversed but only as to the extension of the privilege to federal criminal prosecutions, retaining the recognition of the common law state legislators' speech or debate privilege in all other cases. U.S. v. Craig 537 F.2d 957-958 (1976).

Definitely, *Exparte Young,* supra, does not deal with the fact finding process of any legislative body, and in arguing the applicability of the Eleventh Amendment it patently makes it clear that the Court is not relegating the concept that a case against the state, even though nominally being filed against individual government officials, is barred in the federal forum by the Eleventh Amendment.

Petitioners respectfully submit that the District Court correctly determined that the present case is in essence an action against the State, as it is an action against an "arm" of the Government, jurisdiction from which the federal forum is clearly barred by the Eleventh Amendment. As correctly found by the District Court, the investigative fact finding processes of the Legislative Branch of the Government of the Commonwealth of Puerto Rico are protected against the intervention requested.

In a case involving the scope of interrogation by a Congressional Committee, *Hutcheson* v. *U.S.,* 369 U.S. 599 (1962), this court reasons, at page 619, as follows:

> ". . . Unless interrogation is met with a valid constitutional objection 'the scope of the power of [congressional] inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.' *Barenblatt* v. *United States,* supra, at III. *And it is not until the question is asked that the interrogator can know whether it will be answered or will be met with some constitutional objection. To deny the Committee the right to ask the questions would be to turn an 'option of refusal' into a 'prohibition of inquiry,' 8 Wigmore Evidence (3 ed.) § 2268,* and to limit congressional inquiry to those areas in which there is not the slightest possibility of state prosecution for information that may be divulged. Such a restriction upon congressional investigatory powers should not be countenanced." (Emphasis supplied)

We respectfully submit that in setting guidelines for the Commission's interrogation the Court of Appeals invaded grounds from which it is barred by the Eleventh Amendment. Should the decision of the Seventh

Circuit in Craig, supra, prevail, the scope of the power of legislative fact finding inquiry enjoyed by the states would equal those of Congress whenever a proper inquiry is present and it is not until the question is asked that the interrogator can know whether it will be answered or will be met with some constitutional objection. To deny the Commission the right to ask the question would be to turn an "option of refusal" into a "prohibition of inqury" *Hutcheson* v. *U.S.*, supra.

CONCLUSION

For the reasons stated, a writ of Certiorari should be issued to review the above described Order of the Court of Appeals for the First Circuit.

Respectfully submitted.

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APPENDIX

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. Civ. 77-8100

PUERTO RICO INTERNATIONAL AIRLINES, INC., ET AL

v.

NICOLAS NOGUERAS, JR., ET AL

Order of Court

After consideration of the memoranda filed by the parties and argument presented in an expedited hearing on the merits of these appeals, it is ordered, that the Order of the District Court dated October 31, 1977 dismissing the complaint for lack of jurisdiction be vacated. The Eleventh Amendment does not bar a suit seeking prospectively to prevent state official from taking action in violation of a plaintiff federally protective right. *Employees* v. *Department of Public Health and Welfare,* 411 U. S. 279, 1973; *ex Parte Young,* 209 U. S. 123, 1908;

That this case be remanded to the District Court for further proceeding before another Judge thereof; that a conference be held and if necessary an evidentiary hearing to determine whether or not to what extent management labor negotiation between Prinair and ALPA have been concluded and the extent and nature of any other such negotiation which may be pending between Prinair and other bargaining representative of its employees.

And that the Court on the basis of any stipulation and agreement that may have been arrived at or on the basis of the evidence take such steps if any as it may deem necessary to safeguard the federal right of the party to engage without undue interference in collective bargaining

under the Railway Labor Act, 45 USC, Section 151, et seq. while affording full scope to the Labor Commission of the Senate of Puerto Rico to proceed with all proper legislative inquiry, *Brotherhood of Railroad Trainmen* v. *Jackson Terminal Co.*, 391 U.S. 369, 1969; *The General Electric Company* v. *Callahan* 294, Fed. 2nd. 60 First Circuit 1961, certiorari dismissed, 359 U. S. 832, 1962. These steps may include vacation or amendment of the injunction ordered by the Court on October 31, 1977.

Representations have been made to us that some of the collective bargaining negotiations have neared or reached completion and that other such negotiations may still be concluded; and that a labor commission according to its chairman does not intend in any question it may propound, to "get into any area involving collective bargaining negotiation with ALPA". Under the circumstance we are encouraged to believe that the legitimate interest of both plaintiffs and defendants may be accommodated.

The injunction issued by this Court on October 31, 1977 shall remain in effect until vacated or modified by the District Court. The District Court is urged to confer with the parties herein at the earliest possible time and in any event except as all parties may otherwise agree before November 17, 1977. No costs. It is further ordered that Mandate issue forthwith.

Dana H. Gallup
Clerk

(The above order was received by telephone from Mr. Gallup, Clerk, U. S. Court of Appeals for the First Circuit on November 11, 197 at 4:00 P.M.)

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-1613

PUERTO RICO INTERNATIONAL AIRLINES, INC., JAMES A. CERESA, RAFAEL COLON and JORGE DEL VALLE, *Plaintiffs*

vs.

NICOLAS NOGUERAS, JR., FRANK RODRIGUEZ GARCIA, MERCEDES TORRES DE PEREZ, EDWIN RAMOS YORDAN, JOSE M. RAMOS BARROSO, CALIXTO CALERO JUARBE, HIPOLITO MARCANO, JOSE MARIANO RIOS RUIZ, and JUAN RIVERA ORTIZ, *Defendants*

Order

Plaintiffs herein have filed an action under Clause 2 of Article VI of the Constitution of the United States of America, the Fifth Amendment to said Constitution, Title 45 United States Code, Section 151, et seq, and 42 USC 1983, invoking jurisdiction under 28 USC 1331(a), 1332 and 1343(3).

In essence plaintiffs allege that defendants are all Senators of the Senate of Puerto Rico and that at all times mentioned herein they have been acting under color of state law. It is further alleged that at the present time plaintiff Puerto Rico International Airlines, Inc. (PRINAIR) is engaged in collective bargaining negotiations with its pilots representative, Air Line Pilots Association (ALPA) and that the services of the National Mediation Board are being used pursuant to the Railway Labor Act, 45 USC 151, et seq. That on September 18, 1977 ALPA went on strike against PRINAIR, and that two bargaining sessions have taken place after the strike began.

In the complaint it is stated that codefendant Nicolás Nogueras, Jr., acting as Chairman of the Labor Commission of the Senate of Puerto Rico, of which commission the other codefendants are members, issued subpoenas addressed to coplaintiffs Rafael Colón, James A. Ceresa and Jorge Del Valle, all of the PRINAIR's officers, requiring them to appear at a public hearing to be held by the Commission in relation to several matters, "including, but without limitation, the present state of the collective bargaining of said enterprise (PRINAIR)".

That counsel for plaintiffs appeared before said Labor Comission requesting a 30-day extension of time to appear and at the same time questioning the Commission's jurisdiction which request was denied. Thereafter, codefendant Nogueras, as Chairman of the Commission, caused criminal charges to be filed in the state courts in relation to subpoena previously issued against plaintiffs herein.

Upon a subsequent issuance of subpoenas against plaintiffs, a hearing was held by the Labor Commission at which coplaintiffs Ceresa and Colón were asked several questions directly concerned with the terms being negotiated in the collective bargaining process.

Plaintiff's claim that the Puerto Rico Senate Labor Commission's investigation serves "no legitimate legislative purpose" and they further argue that said investigation will interfere with PRINAIR's rights under the Railway Labor Act and their right to bargain freely with ALPA without governmental pressure. They claim an immediate and irreparable injury and that unless otherwise stopped, the Commission will continue to interfere with plaintiffs' rights under the federally preempted field of collective bargaining in an industry engaged in commerce as defined by federal legislation. As a remedy to all this; plaintiffs

pray for the entry of a temporary restraining order,[1] preliminary and permanent injunction enjoining defendants "from in any manner or way conducting any further investigations in the matters described above".

We lack jurisdiction over the instant action by virture of the provisions of the Eleventh Amendment to the United States Constitution. By plaintiffs' very assertions defendants herein are Senators, members of the Senate of Puerto Rico. As such, they are state officers exercising the sovereign rights of the government. Being thus defendants officers acting in their official capacity as authoritzed by statute or constitution, the action against them is really one against the state, and the Eleventh Amendment operates as a bar to such suit. See, *e.g. Chicago Stadium Corp.* v. *State of Indiana,* 123 F. Supp. 783 (D.C. Ind., 1954) and many others.

This is in reality a suit against the Puerto Rico Senate to mandate one of its commissions to stop an ongoing investigation. The Eleventh Amendment to the United States Constitution bars this type of actions. In *Porter* v. *Bainbridge,* 405 F. Supp. 73 (1975) the United States District Court for the Southern District of Indiana, when faced with a petition which in effect required that the Indiana House of Representatives be mandated by the federal court, reached a conclusion similar to ours and stated:

> "The relief requested by plaintiffs is also barred by the Eleventh Amendment to the United States Constitution since in reality it is a suit to mandate the Indiana House of Representatives, acting as a corporate legislative body and an arm of the state government . . ."

---

[1] On October 25, 1977 upon the filing of the instant case, and after an extended in-chambers conference, we denied plaintiffs' application for a temporary restraining order.

We find that this is in effect a suit against the state legislative body of Puerto Rico. Consequently, we are bound to deny the temporary remedies herein requested and to dismiss the complaint for lack of jurisdiction in view of the provisions of the Eleventh Amendment to the United States Constitution.[1]

The Clerk shall enter judgment accordingly.

It is so ordered.

San Juan, Puerto Rico, October 31, 1977.

SGD. HERNAN G. PASQUERA
U.S. DISTRICT JUDGE

[1] This does not mean that plaintiffs have no judicial recourse in view of their grievances against the Senate Labor Commission. It only means that *federal* courts are not the proper forum for this type of claims. For the availability of judicial relief in this type of cases see the opinions of the Justices of the Supreme Court of Puerto Rico in *Santa Aponte* v. *Ferré*, 1977 CA 10, and 1977 CA 23.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-1613

Re: COMPLAINT FOR INJUNCTIVE RELIEF

PUERTO RICO INTERNATIONAL AIRLINES, INC., JAMES A. CERESA, RAFAEL COLON AND JORGE DEL VALLE, *Plaintiffs*

vs.

NICOLAS NOGUERAS, JR., FRANK RODRIGUEZ GARCIA, MERCEDES TORRES DE PEREZ, EDWIN RAMOS YORDAN, JOSE M. RAMOS BARROSO, CALIXTO CALERO JUARBE, HIPOLITO MARCANO, JOSE MARIANO RIOS RUIZ, and JUAN RIVERA ORTIZ, *Defendants*

Complaint

TO THE HONORABLE COURT:

Plaintiffs very respectfully state and pray:

1. This is an action arising under clause 2 of Art. VI of the Constitution of the United States of America (supremacy Clause), Amendment V to said Constitution, the Railway Labor Act, 45 U.S.C. 151 *et seq.* and 42 U.S.C. 1983, as appears more fully hereafter.

2. This Honorable Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1331(a), 1337 and 1343(3). The mattter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

3. Puerto Rico International Airlines, Inc. (hereinafter "Prinair") is a "carrier" engaged in "commerce" as both said terms are defined in the Railway Labor Act, *supra*. It has approximately 118 "employees" (hereinafter "pi-

lots'') represented by Air Line Pilots Association (''ALPA''), a ''representative'' as both said terms are defined in the Railway Labor Act. Coplaintiffs James A. Ceresa, Rafael Colón and Jorge del Valle are, respectively, the President, Comptroller and Director of Flight Operations for coplaintiff Prinair.

4. Defendants are all Senators of the Senate of the Commonwealth of Puerto Rico and at all times mentioned herein have been acting under color of law of the Commonwealth of Puerto Rico.

5. Since March of 1976, Prinair has been engaged in collective bargaining negotiations with ALPA, its pilots' representative.

6. The subject matters of said collective bargaining negotiations have been, among others, the following: compensation, work rules, minimum pay guarantee, meal, travel and moving expenses, vacation, deadheading, miscellaneous flying, training and promotion, sick leave, grievances, seniority and other terms and working conditions.

7. The last collective bargaining agreement between Prinair and ALPA expired on May 1, 1976.

8. Numerous bargaining sessions were undertaken by Prinair and ALPA trying to reach an agreement. The mediation services of the National Mediation Board were used pursuant to the Railway Labor Act, *supra*.

9. On August 17, 1977, the National Mediation Board set the thirty-day ''cooling off'' period provided by the Railway Labor Act, after whose expiration on September 16, 1977, ALPA could go on strike against Prinair, which in fact happened on September 18, 1977.

10. Notwithstanding said strike, Prinair and ALPA have met and negotiated twice after September 18, 1977. The second and last of said bargaining sessions lasted five (5) days, ending on October 16, 1977.

11. On or about September 27, 1977 codefendant Nicolás Nogueras, Jr., acting as Chairman of the Labor Commission of the Senate of Puerto Rico, of which commission the other codefendants are members, and purportedly acting under color of a statute of the Commonwealth of Puerto Rico, to wit, 2 L.P.R.A. 151 *et seq.*, issued subpoenas addressed to coplaintiffs Rafael Colón, James A. Ceresa and Jorge Del Valle, comptroller, president and director of flight operations of Prinair, respectively, requiring them to appear at a public hearing to be held on September 29, 1977 in relation to the following matters:

> ''The labor-management relations of the airline known as PRINAIR, including, but without limitation, the present state of the collective bargaining of said enterprise, offers and demands made, economic condition of said enterprise and the reasons for the same, salaries and conditions of work of its employees, layoffs or dismissals made during the current year, pending wage claims, contracting of new personnel or of personnel to substitute employees who are on strike. Causes, effects and circumstances related with the existing strike actuation, nature, extent and type of passenger air transportation service of said company, efficiency conditions, safety and trustworthiness in part or in whole of the service to other airlines and everything related directly or indirectly with what is stated above.''

12. The hearing scheduled for September 29, 1977, was continued by codefendant Nicolás Nogueras, Jr. to October 3, 1977 for the same purpose described at par. 11 above. The hearing scheduled for October 3, 1977 was again continued to October 6, 1977 by said codefendant because, among other reasons, a negotiating session between Prinair and ALPA had been scheduled for October 4, 1977 at Washington, D.C.

13. On October 6, 1977 Fernando Ruiz-Suria, Esq., appeared as counsel for plaintiffs Ceresa, del Valle and Colón before said Labor Commission and requested a thirty-day extension of time for them to appear although questioning at the same time the Commission's jurisdiction. This request was denied. Codefendant Nicolás Nogueras, Jr. stated that coplaintiffs Ceresa, Colón and del Valle would be criminally prosecuted for a violation of "the Political Code of Puerto Rico." When this statement was made by codefendant Nicolás Nogueras, Jr., codefendants Frank Rodríguez Garcia, Mercedes Torres de Pérez, Edwin Ramos Yordán and Hipólito Marcano were also present.

14. In fact, codefendant Nicolás Nogueras, Jr. again acting under color of the laws of the Commonwealth of Puerto Rico, caused criminal charges *(denuncia)* to be filed before the District Court of Puerto Rico, San Juan Part, against coplaintiffs Ceresa, del Valle and Colón on October 11, 1977. In said criminal charges *(denuncia)*, codefendants Nicolás Nogueras, Jr. and Juan Rivera Ortíz appear as witnesses for the prosecution.

15. On October 18, 1977 codefendant Nicolás Nogueras, Jr., acting as Chairman of the Labor Commission of the Senate of Puerto Rico, of which Commission the other codefendants are members, and purportedly acting under color of a statute of the Commonwealth of Puerto Rico, to wit, 2 L.P.R.A. 151 *et seq.*, issued subpoenas addressed to coplaintiffs Rafael Colón, James A. Cerosa and Jorge del Valle, comptroller, president and director of flight operations of Prinair, respectively, requiring them to appear at a public hearing to be held on October 21, 1977 in relation to the following matters:

> "The labor-management relations of the airline known as PRINAIR, including, but without limitation, the present state of the collective bargaining of said enterprise, offers and demands made, economic condition of said enterprise and the reasons for the same, salaries and conditions of work of its employees, layoffs or dismissals made during the current year, pending wage claims, contracting of new personnel or of personnel to substitute employees who are on strike. Causes, effects and circumstances related with the existing strike actuation, nature, extent and type of passenger air transportation service of said company, efficiency conditions, safety and trustworthiness in part or in whole of the service to other airlines and everything related directly or indirectly with what is stated above."

16. On October 21, 1977, a hearing was held before codefendant members of the Labor Commission Nogueras, Jr., Torres de Pérez and Marcano. Coplaintiffs Ceresa and Colón were asked several questions by codefendant Nicolás Nogueras, Jr., such as:

(a) Salaries earned by Prinair's pilots at the time they went on strike;

(b) Said pilots' sick leave benefits at said time;

(c) Said pilots' vacation benefits at said time;

(d) Prinair's present financial condition (assets vs. liabilities);

(e) Wage claims pending against Prinair;

(f) Prinair's advertisement for replacement pilots in the local newspapers;

(g) Status of collective bargaining negotiations.

17. Codefendant Nicolás Nogueras, Jr. as Chairman of the said Labor Commission and, to the best information and belief of the plaintiffs, the other codefendants as well, as members of the Commission, have been conducting and will continue to undertake and conduct the investigation of

the matters described in paragraphs 11 and 15 above under color of the laws of the Commonwealth of Puerto Rico for no legitimate legislative purpose and/or in a manner that interferes with plaintiffs' rights in a field preempted by federal law. The purpose of said investigation appears to be to, and will have the effect of, unduly exert governmental and public pressure on Prinair to force it to yield to demands made by ALPA during the bargaining negotiations, which demands Prinair has been resisting and wishes to resist as they are unreasonable. By so doing, Nicolás Nogueras, Jr. and the other codefendants have already interfered and will continue to interfere with rights Prinair and the other coplaintiffs have under the United States Constitution and federal statutes, such as:

(a) The right under the Railway Labor Act to withhold, under given circumstances, information as to the financial condition of Prinair and the reasons therefor;

(b) The right to bargain freely and to reach an amicable settlement with ALPA without interference by the state or by any other governmental unit;

(c) The individual coplaintiffs' right, secured to them by Amendment V to the Constitution, not to be forced to testify in relation to any matters relative to a criminal charge for which they are already being held to answer as alleged at paragraph 14 above;

(d) The right to use self-help by taking necessary, lawful measures, allowed under existing federal law, to continue operating in the face of a strike.

18. Unless restrained by order of this Court, defendants will continue inquiring into the causes and circumstances of the labor dispute between Prinair and ALPA and will subpoena witnesses and compel the production of books,

contracts, papers, documents and other evidence that will further interfere with plaintiffs' aforesaid federal rights. For instance, codefendant Nicolás Nogueras, Jr. has already announced that he will subpoena to testify at the Labor Commission any and all strike replacement pilots that Prinair may hire, as a measure of self-help, in an effort to resume its flight operations and thereby continue operating during the present strike.

19. The legislative investigation described above will cause immediate and irreparable injury, loss or damage to plaintiffs, for which plaintiffs cannot adequately be compensated at law in money damages.

20. It is reasonable to expect that said legislative investigation will be conducted in public, as it has been conducted to date.

21. There is a reasonable probability that plaintiffs will succeed on the merits of this action.

22. Investigations by state bodies of inquiry into the disputes involving industries affecting interstate commerce are in direct conflict with the National Policy of Collective Bargaining and are prohibited. *General Electric Company* vs. *Callahan* 294 F.2d. 60 (5th Cir. 1961), *Oil Chemical and Atomic Workers International Union* vs. *Arkansas Louisiana Gas Company*, 332 F.2d. 64 (10th Cir. 1964) and *Rochester Telephone Corporation* vs. *Levine* 90 L.R.R.M. 3032 (W.D.N.Y. 1975).

23. Plaintiffs are not alleging that a state statute is unconstitutional; they are alleging that the Labor Commission's actions, and specifically that of the Chairman, interfere and will continue to interfere with plaintiffs' rights under the federally preempted field of collective bargaining in an industry engaged in commerce as defined in federal legislation.

WHEREFORE, plaintiffs very respectfully pray for the entry of a temporary restraining order, preliminary and

permanent injunctions enjoining defendants, their agents, servants, employees and attorneys and all other persons in active concert or participation with them from in any manner or way conducting any further investigations in relation to the matters described above, awarding plaintiffs their costs and attorneys' fees and granting them such other and further relief as may be proper.

Very respectfully submitted in San Juan, Puerto Rico, on October 25, 1977.

McConnell Valdes Kelley Sifre
Griggs & Ruiz-Suria
Counsel for plaintiffs
G.P.O. Box 4225
San Juan, Puerto Rico 00936
Telephone: 753-3000

By: Radamés A. Torruella
Radamés A. Torruella
By: Rafael Pérez-Bachs
Rafael Pérez-Bachs

Verification

I, James A. Ceresa, of legal age, married, resident of Guaynabo, Puerto Rico and President of Puerto Rico International Airlines, Inc. (Prinair) under oath do depose and say that I have read the foregoing Complaint and that the averments of fact made therein are true, as I verily believe.

In San Juan, Puerto Rico, on October 25, 1977.

/s/ James A. Ceresa
James A. Ceresa

Affidavit No. 71 (copy)

Sworn and subscribed to before me by James A. Ceresa, of the personal circumstances set forth above and personally known to me in San Juan, Puerto Rico on October 25, 1977.

/s/ Illegible
Notary Public

APPENDIX IV

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 77-8100

Puerto Rico International Airlines, Inc., et al.,
Plaintiffs, Appellants,

v.

Nicolas Nogueras, Jr., et al., *Defendants, Appellees.*

Before Coffin, Chief Judge,
Campbell and Bownes, Circuit Judges.

ORDER OF THE COURT

Entered October 31, 1977

The court, desiring to preserve the status quo pending resolution of this appeal, and desiring also to hear from defendants on the issue of preemption by the Railway Labor Act (cf. *General Electric Co.* v. *Callahan*, 294 F.2d 60; *Oil, Chemical and Atomic Workers* v. *Arkansas, Louisiana Gas Co.*, 322 F.2d 64; *Rochester Telephone Corp.* v. *Levine*, 90 L.R.R.M. 3032) as well as on the issue of existence of an adequate legal remedy for plaintiffs.

Hereby enjoins defendants, their agents, servants, employees, attorneys and others in concert with them from subpoenaing or summoning plaintiffs to present information, written or oral, concerning plaintiffs' collective bargaining negotiation with ALPA until further order of court;

And orders that defendants file with the court a memorandum on the above issues by November 8; and that oral

argument be had on said issues at Boston on Wednesday, November 9, 1977.

By the Court:
/s/ Dana H. Gallup
Clerk.

[Cert. c. Clerk, U.S.D.C., P.R.; cc: Messrs. Torruella and Tulla.]

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-1613

Puerto Rico International Airlines, Inc., et al,
Plaintiffs

v.

Nicolas Nogueras, Jr., et al, *Defendants*

Answer to the Complaint

To The Honorable Court:

Appearing through their undersigned attorneys, defendants Nicolás Nogueras, Jr., Frank Rodríguez García, Mercedes Torres de Pérez, Edwin Ramos Yordán, José M. Ramos Barroso, Calixto Calero Juarbe, Hipólito Marcano, José Mariano Ríos Ruiz and Juan Rivera Ortíz, as Senators of the Senate of the Commonwealth of Puerto Rico and as the Labor Commission thereof, respectfully submit the following answer to the complaint:

General Allegations

1. This Honorable Court lacks jurisdiction to entertain the action and grant the relief requested.

2. The complaint fails to state a claim against the appearing parties upon which any relief may be granted.

3. All conclusions of law averred in the complaint are denied.

4. All factual allegations contained in the complaint, except those specifically admitted below and then only as qualified therein, are denied.

Specific Allegations

With respect to each numbered paragraph of the complaint, the appearing parties allege as follows:

1. Denied

2. Denied

3. Admitted

4. Admitted. It is further specifically averred that as the Labor Commission of the Senate of the Commonwealth of Puerto Rico, defendants have acted within the bounds of their authority and jurisdiction in the discharge of functions and responsibilities assigned under the Rules and Regulations (Reglamento) of said legislative body.

5. Denied for lack of knowledge or information sufficient to form a belief as to the truth of the allegation.

6. Same as number 5 above.

7. Admitted on the basis of testimony given before the Labor Commission. However, it is specifically averred that Prinair and ALPA have reached a new agreement.

8. Admitted on the basis of testimony given before the Commission. It is further specifically averred that as of the date of the first subpoena issued to plaintiffs, the applicable provisions of the Railway Labor Act had been complied with and all procedures and mechanisms thereof had been utilized and exhausted.

9. Admitted on the basis of testimony given before the Commission.

10. Denied for lack of knowledge or information sufficient to form a belief as to the truth of the allegation. It is specifically averred, however, that Prinair and ALPA have already entered into a labor contract and terminated their labor conflict.

11. It is admitted that in accordance with the provisions of 2 LPRA § 151 et seq., plaintiffs were subpoenaed as alleged. It is further specifically averred that the Labor Commission acted pursuant to a directive [1] issued on September 26, 1977 by the President of the Senate, Hon. Luis A. Ferré, to investigate, among other matters, labor-management relations and working conditions in Prinair, La Concha Hotel and the Convention Center, as well as the contract between Hilton International Corporation and the Puerto Rico Industrial Development Corporation. It is further specifically alleged that in accordance with the Rules and Regulations of the Senate of the Commonwealth of Puerto Rico, this directive was properly issued and within the jurisdictional province of the Labor Commission which expressly includes labor-management relations, wages, working conditions, unemployment and job security. Finally, it is averred that the subpoenas were issued in accordance with the referred to directive and thus the last part of the second sentence read as follows: ". . . safety and trustworthiness of the service rendered, subcontracting and contracting of part of all of said service to other airlines, and everything related directly or indirectly with what is stated above".

12. The first sentence is admitted and it is specifically averred that the continuance was motivated by plaintiffs' refusal to appear on the grounds that their personal safety would be in jeopardy and by defendants' willingness to afford plaintiffs an opportunity to comply with the Commissions' subpoenas. Of the second sentence it is admitted only that the hearing scheduled for October 3, 1977 was continued to October 6, 1977 and it is specifically averred that this continuance was made at plaintiff's request, through attorney Fernando Ruiz-Suria, wherein the main

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[1] Copy of the directive issued to the Labor Commission is attached as Exhibit #1. A translation of the same will be submitted as soon as possible.

reasons given were that plaintiffs' personal safety would be in jeopardy and, secondly, that plaintiff James A. Ceresa had been previously subpoenaed to appear as a witness in the case of *Federal Trade Commission* v. *Ruben Donnelly Company* at 10:00 a.m. on October 3, 1977 in Washington, D.C.

13. The first two sentences are admitted but it is specifically averred that the only reason given for questioning (for the first time) the Commission's jurisdiction as to some of the matters included in the subpoena, was plaintiff's lack of knowledge as to the reasons or motives of the investigation and as to any resolution adopted by the Senate or the Commission establishing the scope of said investigation. It is also admitted that codefendants Frank Rodríguez García, Mercedes Torres de Pérez, Edwin Ramos Yordán and Hipólito Marcano attended this hearing. The rest of the paragraph is denied.

14. Denied. On October 6, 1977, co-defendant Nicolás Nogueras, Jr. informed the President of the Senate, the Hon. Luis A. Ferré, of the subpoenas issued to plaintiffs and the results thereof, including their failure to appear at the hearing that morning. On that same date, the latter certified to the Hon. Miguel Giménez Muñoz, Secretary of Justice, that plaintiffs had not heeded subpoenas issued by the Commission and requested that criminal proceedings by instituted pursuant to 2 LPRA sections 153 and 154. It is admitted that in the charges filed (denuncia) co-defendants Nicolás Nogueras, Jr. and Juan Rivera Ortiz appear as witnesses for the prosecution and it is further specifically averred that the charges were later withdrawn.

15. It is admitted only that pursuant to 2 LPRA § 151 et seq., and the directive issued September 26, 1977 by the President of the Senate, plaintiffs were subpoenaed as alleged. It is further specifically alleged that on that same date the Hon. Pedro A. Pérez Pérez, Superior Court Judge,

issued an order directing plaintiffs to appear as subpoenaed or face contempt of Court charges.

16. It is admitted that questions such as those detailed were asked at the hearing on October 21, 1977. It is specifically averred, however, that questions dealing with other areas were also asked and that, through their counsel, plaintiffs specifically stated that their position was that, in their entirety, the matters delineated in the subpoenas were beyond the legitimate legislative interest of the Commission. It is specifically averred that other questions asked dealth with, for example, number and location of airplanes owned by the Corporation, identification of Corporation's officers, character of the Corporation and number of its shareholders, existence of a parent or controlling corporation, pending wage claims, alterations or repairs currently being made to the Corporation's airplanes, contracts with other airlines, employment of security guards, Corporation's financial obligations and liens on its airplanes, average flying time currently lodged in said airplanes, Corporation's plans with regards to its business operations in Puerto Rico, number of passengers using Prinair's services yearly and existence of any active federal intervention in the ongoing labor dispute.

17. It is admitted only that the Senate Labor Commission will continue to undertaken the investigation properly entrusted to it by the Senate's President. The rest of the paragraph is denied and it is specifically averred that said investigation fulfills a legitimate legislative purpose and constitutes a proper and valid exercise of the legislative powers of the Commonwealth of Puerto Rico which does not in any manner interfere with any federal rights of plaintiffs.

18. It is admitted that the Senate Labor Commission will continue undertaking whatever measures be necessary and within its legislative powers and prerogatives to carry out the investigation entrusted to it by the Senate's Presi-

dent, including the issuance of subpoenas to replacement pilots hired by Prinair in order to obtain information pertinent to said investigation, which, as stated at the hearings by chairman Nicolás Nogueras, Jr. and member Hipólito Marcano, is intended to enable said Commission to recommend a course of action as to areas of legitimate concern to the Legislature of Puerto Rico.

19. Denied.

20. Denied. Plaintiffs have not requested that the inquiry be conducted in closed sessions. Such a request can be granted by the Commission and it has done so at the request of the concerned parties on previous occasions.

21. Denied.

22. Denied. None of the cases cited establish that legislative inquiries such as the present one are barred by the referred to policy and the fact that the resulting legislation, if any, may be subject to the Supremacy Clause, in whole or in part, does not means that state legislative inquiries are therefore barred.

23. Admitted. It is specifically averred, however, that plaintiff's premature and speculative invocation of preemption is untenable in the context of a legislative investigation conducted pursuant to admittedly lawful authority.

Affirmative Defenses

1. The complaint fails to state adequate statutory grounds to support the jurisdiction of the Court over the subject matter of the complaint.

2. The complaint fails to state adequate statutory grounds to support the jurisdiction of the Court over the defendants.

3. The complaint fails to state adequate statutory grounds to support the jurisdictional grounds alleged therein.

4. The complaint fails to state an adequate statutory basis for plaintiffs' alleged cause of action.

5. As Senators of the Senate of the Commonwealth of Puerto Rico and as the Labor Commission thereof the defendants are "alter egos" of the Commonwealth of Puerto Rico and thus not "persons" amenable to suit pursuant to 42 USC § 1983.

6. Defendants being but "alter egos" of the Commonwealth of Puerto Rico, the complaint is barred by the provisions of the Eleventh Amendment to the United States' Constitution.

7. As Senators of the Senate of the Commonwealth of Puerto Rico and as the Labor Commission thereof, defendants are immune from suit for actions taken within the scope of their authority in the discharge of their legislative functions and responsibilities.

8. The complaint fails to state specific acts of any of the defendants which amount to a deprivation of any of plaintiffs' federally protected rights.

9. At all times pertinent to the complaint, the defendants have acted in strict compliance with all applicable provisions of law in the good faith performance of their official duties as elected Senators of the Commonwealth of Puerto Rico and as the Labor Commission of said legislative body.

10. The Labor Commission having been directed to conduct the challenged investigation, the complaint fails to include a party indispensable to this action.

11. The allegations of the complaint fail to state a federal cause of action against the defendants under any of the provisions of law cited.

12. Plaintiffs being subject to contempt proceedings for non compliance with lawful subpoenas, the principles of *Younger* v. *Harris* dictate that the complaint be dismissed

and plaintiffs be required to raise their jurisdictional and preemption arguments in said proceedings.

13. The facts and circumstances surrounding the Commission's investigation do not present any federal question.

14. In the factual context of this case, plaintiffs can not assert a federal cause of action against the defendants under the cited provisions of law.

15. On the basis of the alleged facts, no irreparable damage can be established such as to entitle plaintiffs to injunctive relief.

16. The applicable procedures under the Railway Labor Act having been utilized and exhausted, no applicable provision of federal law is available upon which to predicate preemption.

17. The preemption doctrine has been prematurely invoked inasmuch as until legislation is enacted in the alleged preempted field, no class subject to the Supremacy clause can arise.

18. The complaint fails to state facts showing that the circumstances of this case warrant the intervention of this Honorable Court in the legislative and/or judicial proceedings of the Commonwealth of Puerto Rico.

19. Defendants having been sued in their official capacities only and plaintiffs expressly averring that no Commonwealth statute is being constitutionally challenged, *Ex Parte Young*, 209 US 123 (1908) is of no application herein.

20. The federal judicial power under Article III of the Federal Constitution does not extend to suits brought by citizens against their states and this Honorable Court can not enjoin the legislative action of the Commonwealth of Puerto Rico, absent its express submission to the Court's jurisdiction.

Prayer

Wherefore, defendants hereby respectfully move this Honorable Court to dismiss the complaint forthwith, taxing costs and attorney's fees on the plaintiffs and granting such other relief as it may deem just and proper.

In San Juan, Puerto Rico, this 13th day of December, 1977.

MIGUEL A. GIMENEZ MUNOZ
Secretary of Justice

CARLOS A. SHINE
Assistant Secretary of Justice

/s/ JOSE A. GONZALEZ GIERBOLINI
JOSE A. GONZALEZ GIERBOLINI
Assistant District Attorney

JOSE ANTONIO TULLA
Assistant District Attorney

Proof of Service

I hereby certify that on this same date a copy of the above Answer has been sent to Radamés A. Torruella, Esq., and Herbert W. Brown III, Assistant U.S. Attorney, to their respective addresses: G.P.O. Box 4225, San Juan, Puerto Rico 00936 and P.O. Box 3391, Old San Juan, Puerto Rico 00904.

In San Juan, Puerto Rico, this 13th day of December, 1977.

/s/ JOSE A. GONZALEZ GIERBOLINI
JOSE A. GONZALEZ GIERBOLINI
Assistant District Attorney
Department of Justice
Box 192
San Juan, Puerto Rico 00902
Tel.: 723-8010; 723-8019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1034

NICOLAS NOGUERAS, JR., FRANK RODRIGUEZ GARCIA, MERCEDES TORRES DE PEREZ, EDWIN RAMOS YORDAN, JOSE M. RAMOS BARROSO, CALIXTO CALERO JUARBE, HIPOLITO MARCANO, JOSE MARIANO RIOS RUIZ, and JUAN RIVERA ORTIZ,

Petitioners

v.

PUERTO RICO INTERNATIONAL AIRLINES, INC., JAMES A. CERESA, RAFAEL COLON and JORGE DEL VALLE,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REASONS FOR REFUSING TO ISSUE A WRIT OF CERTIORARI

I. JURISDICTION

This Court lacks jurisdiction to entertain the petition for certiorari because the order sought to be reviewed, that of the U.S. Court of Appeals for the First Circuit of November 11, 1977, (Appendix I to petition, pp. 1a-2a) does not constitute a final judgment, *Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U.S. 737, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976).

II. AN ACTUAL CASE AND CONTROVERSY

In their petition, defendants have ignored pars. 13, 16 and 17 of the complaint (Appendix III to petition, pp. 10a-12a), from which more than a mere "possible or conjectural controversy" arises.

Defendants seem to argue, at page 6 of their petition, that there will not be an actual case or controversy unless and until, or "if and when questions are posed to them (plaintiffs) requiring disclosure of matters involved in their collective bargaining," and that the complaint is predicated on a "possibility". Defendants further argue that "plaintiffs (sic) conjectures of the possibility of such questions being asked and the possible overruling of their objections thereto by the Commission" do not present a "genuine and present controversy required for a federally cognizable case".

The argument is based on a false premise because the questions *were actually asked* by defendants and *were actually objected* by plaintiffs. Thus, "at the time the complaint was filed, the only matter pending before the Commission was" *much more than* "the subpoening of plaintiffs to appear before the Commission and testify" (petition, p. 7).

Without attempting to be exhaustive, the following transpired at the hearings held on October 6 and 21, 1977, that is, *before* the filing of the complaint herein on October 25, 1977. Plaintiffs refer to what *actually* happened so as to correct the inaccuracies and omissions in defendants' version (Supreme Court Rule 40.3).

A. At the October 6, 1977 hearing, the following[1] transpired between co-defendant Nogueras, Jr., and

[1] Portions of said hearing, translated by the undersigned.

Fernando Ruiz-Suria, Esq., one of counsel for plaintiffs:

A. (By Mr. Ruiz-Suria): There is an additional reason today, that is that we have serious doubts that most of the matters described in the subpoena fall within the jurisdiction of this Honorable Commission and we reserve the right to question it in the event that . . .

Q. (By co-defendant Nogueras, Jr.): Which of those matters, colleague?

A. There are matters, for example . . .

Q. Which?

A. For example, matters relating to the offers and demands in the negotiations. Matters relating to . . . , and I am only giving you a sample, not a complete list, matters relating to the economic situation of the company and the reasons for same. Matters regarding the contents of the subpoena and which includes each and every other matter which directly or indirectly, which is what the Americans refer to as a "catch-all", in which any subject matter may fall. Furthermore, there are even matters which, if necessary, we would have to raise regarding the legal validity of the subpoenas served.

* * *

Q. No, but the question is whether my colleague claims that his clients claim that that is beyond the jurisdiction of this Commission.

A. Yes, in the manner in which it is stated.

Q. Right, but these phrases, "the present state of the collective bargaining negotiations of said company", is this or is this not within the jurisdiction, as my colleague says, of this Commission?

A. I have serious doubts.

Q. Regarding offers and demands made, my colleague has already stated that it is beyond the jurisdiction?

A. Definitely.

Q. And regarding the economic situation of said company and the reasons therefor, is it the same?

A. Likewise.

* * *

B. At the October 21, 1977 hearing, the following[1] transpired among co-defendant Nogueras, Jr. and Messrs. Néstor Durán, one of counsel for plaintiffs, co-plaintiffs Colón and co-plaintiff Ceresa:

MR. DURAN: We believe that the task before this Commission goes beyond a legitimate legislative interest when it specifically deals with collective bargaining negotiations which are presently under way in this entity. To the extent this investigation or study enters that area, said state of affairs of the negotiations, to that extent, we believe that the law favors our client in the sense that the study or investigation constitutes an interference with said collective bargaining negotiations.

* * *

MR. NOGUERAS, JR.: Before stating our position in that respect, we want to indicate to our colleague for the record, our colleague has this Commission's subpoena with him. So that I may understand the jurisdictional issue that our colleague raises. Our colleague objects to this Commission's jurisdiction regarding the investigation and study of the labor-management relations of the airline known as PRINAIR. Does he not?

MR. DURAN: That is correct.

[1] Portions of said hearing, translated by the undersigned.

MR. NOGUERAS, JR.: He also objects to the references made to the status of the collective bargaining negotiations of said company, offers and demands made.

MR. DURAN: That is correct.

MR. NOGUERAS, JR: The economic situation of said company and the reasons therefor.

MR. DURAN: That is correct.

MR. NOGEURAS, JR.: Salaries and working conditions of the employees.

MR. DURAN: That is correct.

* * *

MR. NOGUERAS, JR.: Then our colleague states that he also objects to the issue of salaries and working conditions of the employees.

MR. DURAN: Our position is that in its entirety, taken as a whole, the matter under discussion before this Commission, we respectfully believe goes beyond a legitimate legislative interest as a whole.

* * *

Q. (By co-defendant Nogueras, Jr.): I want to ask Mr. Colón whether he will furnish to this Commission, within the period of time fixed hereby of ten days, the information requested regarding the location of the PRINAIR aircraft.

MR. COLON: I respectfully decline to answer your question at this time on the advice of my attorneys, since there are two criminal charges pending against me with respect to subpoenas to appear before this Hon. Commission. I believe that the subject matter to which my objection is raised does not fall within the jurisdiction of this Hon. Commission.

* * *

MR. NOGUERAS, JR.: Mr. Colón, what are the total liabilities if PRINAIR?

MR. COLON: Sir, I respectfully decline to answer that question for the reason aforementioned.

MR. NOGUERAS, JR.: What do you mean, aforementioned?

MR. COLON: For the aforementioned reason that, on the advice of my attorney, since there are two criminal charges pending against me regarding subpoenas to appear before this Hon. Commission, which could incriminate me, and furthermore because I believe the subject matter does not fall within the jurisdiction of this Hon. Commission.

* * *

MR. NOGUERAS, JR.: How many PRINAIR pilots are on strike?

MR. COLON: One hundred eighteen.

MR. NOGUERAS, JR.: One hundred eighteen. And were there any other lay-offs of personnel other than PRINAIR pilots during the last few weeks?

MR. COLON: Yes, sir.

MR. NOGUERAS, JR.: How many were laid off?

MR. COLON: Sir, that question falls within the same category aforementioned.

* * *

MR. NOGUERAS, JR.: You were mistaken. Well, if you, that is, you were instructed to answer and you did not answer the question. If you were given ten days within which to obtain specific information regarding the contracts, could you furnish said information and copy of those contracts to this Commission?

MR. COLON: I believe that does not fall within the jurisdiction of this Hon. Commission.

* * *

Q. Witness, what are the total liabilities and accounts payable to date of Prinair, approximately?

A. I again object to the question because of jurisdiction. That is, rather, on the advice of an attorney, I decline to answer.

Q. You decline to answer, on what basis?

A. On the basis of jurisdiction.

Q. On the basis of jurisdiction. Witness, what is the total amount of assets, the amount of money that represents the assets of Prinair to date, as of the most recent date to your knowledge?

A. I emphasize the aforementioned.

Q. Regarding what?

A. Jurisdiction.

Q. Witness, in the last six months, in the last year, we correct, has Prinair made any loans to its parent corporation or to any of its shareholders in amounts exceeding ten thousand dollars?

A. I sustain my position regarding jurisdiction as aforementioned with respect to this question.

Q. Without mentioning any amounts, we ask you whether there have been any such loans.

A. I sustain my position as aforementioned.

Q. Witness, are there any judicial or extrajudicial claims pending against Prinair which may affect its assets?

A. I sustain the same position.

Q. Witness, do you have knowledge of any wage claim pending before the Superior Court, San Juan Part against Prinair?

A. Yes, sir.

Q. You do have knowledge. For accounting purposes, when a claim of that nature is pending, do you establish any reserve for what is known as a "contingent liability"?

A. I again emphasize my position as aforementioned regarding the question of jurisdiction.

* * *

Q. Mr. Ceresa, are you presently thinking of moving Priniar's operations outside of Puerto Rico?

MR. CERESA: Honorable Commission, the matter covered by your question I believe falls beyond the jurisdiction of the Honorable Commission, I request your approval of my retraction at this time.

Q. Since the witness has just requested the approval of this Commission for declining to answer, the request is denied and he is instructed to answer.

A. Honorable Commission, the matter covered by your question I believe falls beyond the jurisdiction of the Honorable Commission.

Q. Mr. Ceresa, what are the salaries paid to Prinair pilots and co-pilots?

A. Honorable Commission, the matter covered by your question I believe falls beyond the jurisdiction of the Honorable Commission.

* * *

Q. Mr. Ceresa, how many days of vacation were the striking Prinair pilots entitled to up to the time of the strike?

A. Honorable Commission, I refrain from answering due to the reasons stated above regarding jurisdiction.

Q. Mr. Ceresa, how many days of sick leave were the Prinair pilots entitled to up to the time of the strike?

A. Honorable Commission, I refrain from answering because of these reasons of jurisdiction.

Q. Mr. Ceresa, what is the present status of the collective bargaining negotiations between the Company and the pilots union?

A. Honorable Commission, I again refer to my previous answer regarding jurisdiction.

Q. Mr. Ceresa, have you personally, or through other representatives of Prinair, contracted pilots and copilots to perform the services previously performed by the striking Prinair pilots?

A. Honorable Commission, again I refrain from answering due to the reasons aforestated regarding jurisdiction.

Q. Mr. Ceresa, I ask you, do you have any knowledge of the fact that Prinair intends to bring or will bring to Puerto Rico personnel to fly its aircraft, which personnel has been contracted or will be contracted outside of Puerto Rico?

* * *

MR. PRESIDENT (codefendant Nogueras, Jr.): Let us ask the same question again from different angles so that you may answer.

Mr. Ceresa, do you have any knowledge of pilots or copilots who have been contracted by Prinair to perform the flights normally performed by the striking pilots?

A. Honorable Commission, at this time I respectfully decline to answer this question inasmuch as I am personally under criminal charges directly related to subpoenas for me to appear

before this Honorable Commission. On the same matters covered by your question and upon advice of my Counsellor I must decline at this time to answer as I could incriminate myself. Furthermore the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

* * *

Q. And the payments made to date regarding said guards or security agents. Mr. Ceresa, is there scheduled, or pending to be held, a meeting to collectively negotiate with the pilots' union which you represent? The pilots' union representing your employees, that is.

A. Honorable Commission, the matter covered by your question I believe falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, is there scheduled any meeting before any federal officer, or any agency or entity . . .

MR. DURAN: Federal?

Q. Federal . . . pursuant to the provisions of the Railway Labor Act or any other applicable statute to deal with, in any form or manner, through arbitration, mediation, conciliation, or any other mechanism, the labor-management conflict or the collective bargaining negotiations between the pilots' union of Prinair and Prinair?

A. Honorable Commission, again I must state the matter covered by your question, I believe falls beyond the jurisdiction of this Honorable Commission at this time.

Q. What are the total liabilities of Prinair to date?

A. Honorable Commission, again at this time, the matter covered by your question, I believe, falls

beyond the jurisdiction of this Honorable Commission.

Q. Witness, what are the total assets of Prinair Corporation to date? That is, the amount of money constituting assets of Prinair to date?

A. Honorable Commission, at this time it is my opinion that the matter covered by your question falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, is there pending any wage claim against Prinair filed by its pilots in the Superior Court of San Juan or any other court?

A. Honorable Commission, at this time the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. For the record, the witness has been instructed, and is instructed, to answer.

A. A claim has been filed, to the best of my knowledge.

Q. Excuse me?

A. A wage claim has been filed.

Q. Has been filed? What is the status of said wage claim?

A. Honorable Commission, the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, how many passengers patronize Prinair flights annually?

A. Honorable Commission, it averages between 750,000 to 850,000 during the last five years.

Q. When you say during the last five years, how much is that annually?

A. Approximations, Senator, would be: in 1972, 800,000; in 1973, 700,000; in 1974, 800,000; in

1975, 880,000; in 1976, 845,000. These are approximations.

Q. Taking the last year, what volume of income does this represent?

A. Honorable Commission, the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, what is the last offer made by the company at the bargaining table to the pilots' union? At the collective bargaining negotiations?

A. Honorable Commission, at this time the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. You are instructed to answer.

A. Honorable Commission, the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

* * *

Q. Mr. Ceresa, is there any person in Puerto Rico who has been contracted to perform the services previously rendered by the striking pilots?

A. Honorable Commission, the matter covered by your question at this time, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, has Prinair placed an advertisement in the newspaper media of Puerto Rico requesting personnel to perform the services previously rendered by the striking Prinair pilots?

A. Honorable Commission, the matter covered by your question at this time, I believe, falls beyond the jurisdiction of this Honorable Commission.

* * *

III. ELEVENTH AMENDMENT IMMUNITY

The concurring opinion of Circuit Judge Tone in *U.S.* v. *Craig,* 528 F.2d 773 at 782 (7th Cir. 1976) [3] states in part:

> "The common law immunity of state legislators has not been held to be coextensive with that which members of Congress enjoy under the federal speech or debate clause. Even with respect to civil liability, speech-or-debate immunity is broader than official immunity. The former bars injunction actions directed at legislative activities of Congress. E.g., *Estland* v. *United States Servicemen's Fund,* 421 U.S. 491, 95 S.Ct. 1813, 44 L. Ed. 2d 491 (1969). The doctrine of official immunity, on the other hand, has been held by one court not to bar injunctive relief against state legislative activities which offend federal law, *Jordan* v. *Hutcheson,* 323 F. 2d 597 (4th Cir. 1963), and in other cases federal injunctions against state legislative action have been sustained without discussion of the question of immunity. E.g., *Bond* v. *Floyd,* 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 235 (1966); *Bush* v. *Orleans Parish School Board,* 191 F. Supp. 871 (E.D. La.), aff'd sub nom. *Denny* v. *Bush,* 367 U.S. 908, 81 S. Ct. 1917, 6 L.Ed. 2d 1249 (1961)."

This case does not present a genuine XI Amendment issue because *only* injunctive relief, and no money damages, is sought by plaintiffs, *María Santiago* v. *C.R. U.V.* 554 F. 2d 1210 at 1212-1213 (1st Cir. 1977):

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[3] Defendants rely on this case at p. 10 of their petition.

"Where only injunctive relief is at issue, it may seem odd to separate a government's immunity from that of its officers. After all, it might be argued, someone suing a government officer in his official capacity is 'really' suing the government. Puting the question this way, however, obscures the balancing of interests that characterizes this area of the law. Sovereign immunity is a limit on the courts' ability to interfere in the functioning of government, but it is limited in turn by the deep-seated belief that not even government may flout the law. This tension has been resolved by a fiction —an officer disobeying the law may be enjoined even when his government may not. *Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Although the courts have sometimes strayed from a frank recognition of this fiction as an expression of underlying principles, the principles have been strongly reaffirmed of late. In dealing with state immunity from suit, the Supreme Court has substituted a simple rule for more metaphysical inquiries into when a suit against an officer is 'really' a suit against the state. When state officers are sued, the Court held, federal courts may grant prospective but not retrospective relief. *Edelman* v. *Jordan,* 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). The line drawn by the Court represents a compromise between the impulse to preserve state autonomy and the need to enforce federal law. Injunctions are necessary to assure the supremacy of national law; damage awards are not. Like considerations led Congress to draw a similar line in suits against the federal government; it has clarified the murky area of federal sovereign immunity by permitting injunctive actions directly against the government. Pub. L. 94-574 (1976) (amending 5 U.S.C. §§ 702-03).

"We think that the same tension which shaped federal sovereign immunity and eleventh amendment doctrine is shaping the immunity bestowed

by *Monroe* v. *Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). Although the Supreme Court has not ruled, the circuit decisions are falling into a pattern very like the one that governs eleventh amendment cases: while many government entities are immune from suit under § 1983, their officials, even when sued in an official capacity, do not share the immunity, at least when only injunctive relief is sought . . ."

Insofar as defendants claim, at pp. 7-8 of their petition, that "plaintiff's resistance to the Commission's subpoenas and the subsequent efforts of the latter to enforce said subpoenas by legal proceedings . . . are matters of state law that, under the facts of this case, are not open to interference by the Federal Judicial power", citing *Younger* v. *Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) and *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482, reh. den. 421 U.S. 971, 95 S. Ct. 1969, 44 L. Ed. 463 (1975), suffice it to say that no injunctive relief against ongoing criminal proceedings (*Younger*) or civil but quasi-criminal proceedings (*Huffman*) has been sought herein and furthermore, all criminal charges against plaintiffs "were later withdrawn" (Appendix V to petition, p. 20a, par. 14). No state proceeding being pending, criminal or otherwise, the *Younger-Huffman* doctrine is simply inapplicable herein. Compare *Hicks* v. *Miranda,* 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975) with *Ellis* v. *Dyson,* 421 U.S. 426, 95 S. Ct. 1691, 44 L. Ed. 2d 274 (1975) and *Doran* v. *Salem Inn, Inc.,* 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975).

Defendants seem to argue, at p. 9 of their petition, that a challenge to the constitutionality of a statute sought to be enforced is indispensable herein, as if this

case presented an issue under the now repealed three-judge court legislation. Such a challenge is not present herein (only defendants' *actions* are being challenged) and it is not indispensable. Cf. *Butler* v. *Dexter,* 425 U.S. 262, 96 S. Ct. 1427, 47 L. Ed. 2d 774 (1976); *Morales* v. *Turman,* 430 U.S. 322 (1977); *Costello* v. *Wainwright,* 430 U.S. 325 (1977).

Under the guise of the XI Amendment, defendants would like to be *the* final judges of their own powers and privileges in cases in which the federal rights and liberties of United States citizens are concerned and they would *never* have the legality of their actions examined and determined by *any* court. The law is otherwise, *Kilbourn* v. *Thompson,* 103 U.S. 168 at 199 (1881):

> "The House of Repsesentatives (says the court) is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That House is not the Legislature, but only a part of it, and is therefore subject in its action to the law in common with all other bodies, officers and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written Constitution, no branch or department of the government is supreme, and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the Legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void . . ."

IV. CONCLUSION

The petition for certiorari does not present special and important reasons for review (Supreme Court Rue 19) and it should be denied, as it is hereby very respectfully requested.

Respectfully submitted.

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